United States Court of Appeals

for the Second Circuit

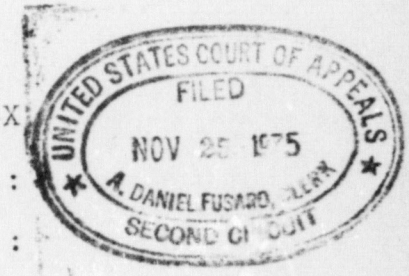
APPELLANT'S REPLY BRIEF

Court-original

75-7295 B

P/S

To be Argued by
JANET BENSHOOF



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHERYL PERRY HILL, THELMA LINDO, VICTORIA RAPHAEL, LURLINE RUTHERFORD, and ANSONIA LEWIS, for themselves and all persons similarly situated,

Plaintiffs-Appellants,

-against-

A-T-O, INC., FAMILY BUYING POWER, INC., NATIONWIDE PROMOTIONS, INC., EXECUTIVE BUYING POWER, INC., FAMILY CLEANING POWER, INC., COMPACT ASSOCIATES, INC., COMPACT BELLEROSE, INC., COMPACT ELECTRA CORP., HYMAN SINDELMAN, a/k/a HY DELMAN, M. ROBERT DORTCH and FRANK DORTCH,

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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JANET BENSHOOF

UNITED STATES COURT OF APPEALS
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Docket No. 75-7295

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REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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PREFACE

This is an appeal from two orders of Judge Walter Bruchhausen of the United States District Court for the Eastern District of New York. The first order, dated March 5, 1975, granted defendants leave to reargue their motion for summary judgment, granted summary judgment and dismissed the complaint. The second order, dated April 11, 1975, denied plaintiffs' motion for leave to amend their complaint and 9(g) statement.

This reply brief is written in response to the three briefs filed by the defendants-appellees. Plaintiffs rely on the statement of the case and statement of facts found in their main brief.

POINT I

THE COERCION REQUIREMENT IN CAPITAL TEMPORARIES IS NOT APPLICABLE TO THIS CASE

The crucial issue on this appeal is whether the court below correctly applied the coercion requirement defined in Capital Temporaries, Inc. of Hartford v. The Olsten Corporation, 506 F. 2d 658 (2d Cir., 1974), to the facts of this case. Defendants in their briefs seize on particular language in Capital Temporaries and argue that since plaintiffs did not explicitly allege they were coerced into buying the tied product the entire case must be dismissed. Plaintiffs assert that not only was the legal standard of coercion incorrectly applied but also that the facts in the record at the very least raise questions of fact as to whether or not the plaintiffs were coerced into buying the vacuum cleaner.

Defendants application of Capital Temporaries to the instant case not only fails to recognize critical factual distinctions, but also ignores the differing postures of the two cases. This appeal arises from an order of the district court granting defendants summary judgment dismissing the action. Plaintiffs did not cross-move for summary judgment below so the question of whether or not there is proof of a per se illegal tie-in is not before this court. The opinion granting defendants summary judgment

held, on authority of Capital Temporaries, that plaintiffs failed to explicitly allege coercion in the complaint, the 9(g) statement, and the affidavits. Although the opinion in Capital Temporaries found the plaintiff there failed to prove he was actually coerced into buying the tied product, the decision carefully limited this coercion requirement to actions where the per se doctrine was being applied. In Capital Temporaries the plaintiff in the district court made a cross-motion for summary judgment on the ground that there was proof of a per se unlawful tie-in. The Court of Appeals then squarely addressed the question of whether or not the plaintifff had to show actual coercion to prove a per se illegal tie-in. Unlike Capital Temporaries, the complaint here alleges not only that the tie-in is illegal per se but also that it is unlawful in fact. [Amended Compl. ¶ 29, I-19] This allegation places the tie-in under the "rule of reason test" should plaintiffs fail to prove the elements necessary for the per se doctrine.

> "However, before the plaintiff can become entitled to the benefit of the per se doctrine and thereby escape the proof otherwise required to establish an undue or unreasonable restraint under the rule of reason approach, it is basic that he first establish that he is the unwilling purchaser of an unwanted product."
> Capital Temporaries Inc. of Hartford v. The Olsten Corp., supra at 662.

A major limitation, therefore, to the coercion requirement in Capital Temporaries, is that it only must be satisfied if plaintiffs are seeking to prove a tie-in illegal per se. This limitation was ignored by the court below as the order dismissed not only plaintiffs' claim under the per se doctrine but also under the rule of reason test.

In Bogosian v. Gulf Oil Corp., et al., 1975 Trade Cases, ¶ 60,283 (E.D. Penn.) the district court recognized the limited use of the coercion requirement in Capital Temporaries and held that case not relevant as it only applied to the per se rule. The court held that even if the facts were not alleged as necessary to prove a per se violation, the plaintiff could prove his claim under the rule of reason test.

> "The compulsion requirement of Olsten is merely evidence of the economic power of the tying product. . . . The Supreme Court has made it clear in [Fortner] that it only becomes necessary to show that the tying product has sufficient economic power to restrain free competition in the tied product and affects a not insubstantial amount of commerce if the plaintiff seeks to benefit from the per se rule. Thus, as Fortner held, it is inappropriate to grant summary judgment if the plaintiff merely fails to allege facts which, if proved would bring into operation the "per se" rule. . . .
> Id. at p. 66,111.

In addition to ignoring this important limitation set on the coercion standard in Capital Temporaries, defendants also fail to recognize crucial factual distinctions. In Capital Temporaries there was no evidence of a company policy of only selling the white collar franchise (the tying product), with the blue collar franchise (the tied product). The company policy in the instant case of only selling FBP with the vacuum cleaner is undisputed. In Capital Temporaries there was no large number of ties, rather one individual was alleging one unlawful tying arrangement. Moreover, there was no proof that the tie was detrimental since the court found no requirement the products had to be taken together nor was any attempt to force the plaintiff to open a blue collar service. The present case is certified as a class action with a class of some 10,000 low income consumers all of whom entered into contracts with defendants for the purchase of vacuum cleaners and membership in the buying service. The New York area sales totals amount to about 14,813 for the relevant period starting November 1, 1967 and ending July 31, 1974. (Def. SINDELMAN'S Ans. to Plf. Interrog., Ex. A, I-41). Evidence of the fact that these ties were not beneficial to the plaintiffs comes from their affidavits which reveal they did not want or need a vacuum cleaner, and from the unfavorable nature of the contracts, namely requiring them to pay up to more than $500.00 for a $90.00 vacuum cleaner.

[See Plf. Main Brief p. 42] Most importantly, in Capital Temporaries there was no evidence of market power in the tying product from which coercion could be inferred. The Listen white collar mark and service did not have market dominance nor was it an attractive or unique service. In contrast, plaintiffs have shown that Family Buying Power is presented as a unique, attractive service with no genuine competitors in the New York area. An exclusive franchise to sell FBP is held by the Compact defendants. [See Plf. Main Brief pp. 37-43]. The court below in its first opinion, dated June 19, 1974 found that the "facts raised by the petitioner, if proved during trial, make the per se doctrine applicable to the tying arrangement." [I-30] Whether or not plaintiffs have raised sufficient questions as to the market power of FBP is not, therefore, an issue on this appeal.

Defendants cite Stan Kane Home Improvement Center v. Martin Paint Stores, 1975 Trade Cases ¶ 60, 379 (S.D.N.Y. June 19, 1975), in support of the proposition that allegations of actual coercion are necessary in all per se unlawful tie-in cases. This case held that the plaintiff franchisee was not entitled to summary judgment and must prove at trial that the defendant Martin had the economic power to coerce Kane into an agreement that Kane did not wish to sign. This opinion supports plaintiffs' argument that the record, at the very least, shows coercion to be a

question of fact entitling them to a trial.

POINT II

DEFENDANTS CHARACTERIZATION OF FAMILY BUYING POWER AS A MERE 'PROMOTIONAL GIVEAWAY' IS ERRONEOUS AND DOES NOT EXEMPT THEM FROM THE PURVIEW OF SHERMAN I.

Defendants attempt to remove the FBP-vacuum cleaner tie-in from the antitrust laws by characterizing Family Buying Power as a "free" promotional giveaway similar to the free meal on an airline or a toy in a crackerjack. This interpretation completely ignores the facts presented in the record which show the buying service was represented as very valuable and unique and this was believed by plaintiffs who were coerced into purchasing the vacuum cleaner in order to obtain the buying service.

Compact has an exclusive franchise to sell Family Buying Power memberships in the New York area (Amended Compl. ¶ 19, 1-19; Aff'd. of DOUGLAS ACKERMAN, Ex. B, I-23). FBP is a nationwide buying service through which members can supposedly obtain discounts on countless items. The plaintiffs were told they could obtain virtually all consumer items at wholesale prices through FBP and save thousands of dollars. (Amended Compl. ¶ 13, I-19; Aff'd. of DOUGLAS ACKERMAN, Ex. D-F, I-23; Def. SINDELMAN's Ans. to Plf. Interrog., No. 34, I-41). Using set sales presentations the Compact salesmen represented FBP as "unique" and "copyrighted" (Amended Compl. ¶ 25, I-19; Aff'd. of

ACKERMAN, Ex. C, I-23; Def. DORTCH Ans. to Plf. Interrog., No. 84, I-74; Def. SINDELMAN Ans. to Plf. Interrog., No. 54, I-41) and would save consumers many times the cost of the vacuum cleaner. (Amended Compl. ¶ 31(d), I-19) Since plaintiffs were told that the buying plan was free and since the $12.50 cost was never revealed to them, they assumed it was worth far more. Because plaintiffs believed FBP to be valuable and unique they were coerced into buying a vacuum cleaner which they did not need or want. It is clear from plaintiffs' affidavits they would have purchased FBP separately if it were so offered. The purchase of the Compact vacuum cleaner was detrimental as they already had a satisfactory vacuum cleaner.

*"If Family Buying Power had not been included as part of the sale, I [plaintiff HILL] would not have bought the Compact vacuum cleaner. When I bought the Compact, I already owned a General Electric vacuum cleaner which worked quite well. I was not shopping or looking for a new vacuum cleaner." (Aff'd. of Plf. HILL, ¶ 5, attached to Aff'd. of ALLEN BENTLEY, I-64).

*"In a sales presentation which lasted an hour or more, he [the Compact salesman] discussed membership in a nationwide buying service called Family Buying Power, which was available only from Compact . . . He claimed that tremendous savings were available to FBP members, that I could only get FBP membership if I bought

the vacuum cleaner. . . . I already had an upright vacuum cleaner which was quite satisfactory. I was not shopping for or considering buying a new one." (Aff'd. of Plf. RAPHAEL, ¶¶ 2, 6, attached to Aff'd. of ALLEN BENTLEY, I-64).

*"I was just married and needed to buy many things so I thought my savings [using FBP] would be substantial. I have never heard of anything like FBP and had no idea of whether any similar buying service might be available to me. The salesman said FBP was only available to people who bought the Compact vacuum cleaner, in which case it was included without charge. If I could have bought FBP separately, I would not have bought the vacuum cleaner. . . . I already had an adequate canister vacuum cleaner and was not at all in the market for a new vacuum cleaner." (Aff'd. of Plf. LEWIS, ¶¶ 3, 4 attached to Aff'd. of ALLEN BENTLEY, I-64) (emphasis added).

It is clear from the record that the salemen represented the buying service as very valuable and unique and these representations were believed by plaintiffs. In fact, at least one salesman stated that FBP was selling for $360.00 outside of the New York area. (Plf. motion to reargue, transcript of tape recording of sales presentation, p. 16, I-84). Based on this figure, if anything is to be characterized as a promotional giveaway, it would be the vacuum cleaner, not the buying service. A consumer is

readily able to assess the value of a toy in a crackerjack or a free meal on an airplane. The plaintiffs, however, believed the buying service to be so valuable and unique they were coerced into buying a vacuum cleaner which they did not want or need. Because they believed FBP would save them hundreds of dollars the high purchase price for the vacuum cleaner was made palatable. It would be ludicrous to argue that someone would buy a plane ticket they could not use to get a free meal. Defendants argue that FBP was ancillary to the alleged tied product so there was, in effect, only one product. This argument completely ignores the affidavits of the plaintiffs as well as the case law defining the two product requirement for an illegal tie-in. Defendants characterization of FBP as "free" with the purchase of the vacuum cleaner does not free the tie from scrutiny under Sherman §1. In Detroit City Dairy, Inc. v. Kowalski Sausage Co. Inc., ¶ 60,228 1975-1 Trade Cases (E.D. Mich.) the plaintiff claimed damages due to unlawful tying where the defendant would give a free neon sign with their name on it only on condition plaintiff purchased wholesale grocery items from them. The Court in Detroit Dairy had no problem in finding the free neon sign the tying product, the polish hams the tied product, and that this tie-in was illegal per se under Sherman §1. Similarly, in The Michigan Bar Review Center, Inc. v. Nexus Corp., et. al., 1971 Trade Cases ¶ 73, 694 (E.D. Mich) pending the ac-

tion the court enjoined defendants from offering students a free mini course on condition the students would buy the main course. The court defined this as a tie-in arrangement.

POINT III

THE CLASS ACTION CERTIFICATION IN THE DISTRICT COURT IS NOT AN ISSUE TO BE REVIEWED ON THIS APPEAL

Both A-T-O defendants and FBP defendants argue in their briefs on this appeal that the district court erred when it certified a class in an order dated January 21, 1975. This order was never appealed. This instant appeal is taken by plaintiffs from an order granting defendants summary judgment and dismissing the complaint. It is not proper for defendants to raise the class certification order for review, contingent on this Court reversing the decision of March 5, 1975 thereby reinstating this action. Not only is the class certification order not an issue on this appeal, it is doubtful whether it could ever be considered appealable under 28 U.S.C. §1291, assuming defendants had taken a timely appeal.

The Supreme Court in Eisen v. Carlisle & Jacquelin, 417 U.S. 156 , 94 S. Ct. 2140 (1974), squarely addressed the question of whether the Second Circuit Court of Appeals had jurisdiction to review a class action order of the district court which certified a class and imposed 90% of the cost of notice on the respondents. The Supreme Court in Eisen relied on the guidelines defined in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) and held that the case came within the "small class" of orders

which could be appealed as it "finally" determined an important independent collateral right of respondents. In the instant case no independent, collateral right of defendants has been decided. Consistent with Eisen the cost of notice to the class was placed on the plaintiffs. The only burden placed on defendants is that the case is to proceed as a class rather than an individual action. This alone cannot be held to be " . . . too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Indus. Loan Corp., supra at 546. Subsequent to Eisen, the Eighth Circuit Court of Appeals has held that an order certifying a class can never be appealable as a "final" collateral order under 28 U.S.C. §1291. In re Cessna Aircraft Distributorship Antitrust Litigation, 1975-1 Trade Cases, ¶ 60,376 (8th Cir.), cert. denied _____ U.S. _____, November 11, 1975 (docket No. 75-435).

CONCLUSION

For all of the foregoing reasons, the orders of Judge Bruchhausen dated March 5, 1975 and April 11, 1975, granting the defendants' motions for summary judgment and denying plaintiffs' motion for leave to amend their complaint and statement pursuant to Local Rule 9(g), should be reversed in all respects.

Respectfully submitted,

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Dated: November 25, 1975
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